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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. RICKY GONZALES, Defendant and Appellant.	C046237 (Super. Ct. No. MF027235A)

Defendant Ricky Gonzales was convicted of numerous crimes based upon an incident involving rival gang members. On appeal, he contends (1) the trial court erred in failing to instruct on attempted voluntary manslaughter as a lesser included offense to the charge of attempted murder, (2) the court erred in not giving a unanimity instruction with respect to aggravated assault charges, and (3) the evidence does not support the jury's finding that he was a convicted felon in possession of a firearm.

The People, represented by the office of the Attorney General of California, inexplicably and inexcusably failed to timely file a respondent's brief.[1]

For reasons that follow, we shall affirm the judgment.

FACTS

The convictions in this case arose out of an incident that occurred in Manteca on May 14, 2003. Two Hispanic street gangs are active in Manteca. The predominant gang is the Nortenos. Norteno derives from the Spanish word for north, and members of the Nortenos are primarily associated with other northern California street gangs. The other, and much smaller, gang is the Surenos, which is associated with southern California street gangs. The Nortenos and the Surenos are rival gangs.

Defendant is a Norteno. He is regarded as a "shot-caller," meaning he has sufficient reputation and influence that he can direct the actions of other gang members. The primary victim in

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[1] Defendant's opening brief was filed on June 16, 2004. The People's counsel, Deputy Attorney General Janine R. Busch, requested and received two extensions of time--the last to September 15, 2004--to file a respondent's brief. Without any other communication with this court, the People failed to file a brief on or before September 15, 2004. On September 20, 2004, this court notified the People that their brief was overdue and that if it was not filed by October 20, 2004, the appeal may be submitted for decision on the record and on defendant's brief. (Cal. Rules of Court, rule 17(a)(2).) Although over four months had passed since defendant's opening brief was filed, the People failed to file a respondent's brief on or before October 20, 2004. On November 3, 2004, Deputy Attorney General Busch sought permission to file an untimely respondent's brief. The motion was denied.

this case, Angel Roblero, is a Sureno. He also is regarded as a shot-caller.

For about a week prior to the May 14 incident, Roblero had been having confrontations with Dwayne Harris, a Black male known to associate with Nortenos. According to Roblero, his brother had been threatened by Harris and, in response, Roblero had tried to confront Harris into a one-on-one fight, but Harris consistently backed down.

On the afternoon of May 14, 2003, Roblero visited the home of a friend. Roblero and Fabian or Favian Perez put lawn chairs in front of the house to sit and drink beer. They noticed a car stop and saw several persons, including defendant and Harris, get out and approach. Harris got a two-by-four out of a truckbed and began making threatening gestures with it. Insults were exchanged until defendant pulled out a pistol and pointed it at Roblero and Perez. In keeping with his philosophy "ain't no man or tattoo can stop a bullet," Roblero ran into the house with Perez. Defendant tried unsuccessfully to open the door, then left with his cohorts.

Roblero was extremely angry and got into his car to chase after them. When defendant's car made a U-turn and came back in Roblero's direction, the cars collided and became attached to each other. Defendant then pointed his gun out the window and began shooting at Roblero. However, Roblero ducked down and pushed on the gas until his car broke free and crashed into a fence pole. Defendant and his cohorts got out of their car and fled from the area on foot. Defendant was arrested in the vicinity a short time later.

Defendant was found guilty of attempted murder of Roblero (count one; Pen. Code §§ 187, 664 [further section references are to the Penal Code unless otherwise specified]), discharge of a firearm at an occupied motor vehicle (count two; § 246), assault on Roblero with a semiautomatic handgun (count four; § 245, subd. (b)), assault on Perez with a semiautomatic handgun (count five; § 245, subd. (b)), active participation in a criminal street gang (count six; § 186.22, subd. (a)), and possession of a firearm by a convicted felon (count seven; § 12021, subd. (a)(1)).

The jury further found that defendant acted for the benefit of, at the direction of, or in association with a criminal street gang and with the specific intent to promote, further, or assist criminal conduct by the gang with respect to counts one, two, four, five, and seven (§ 186.22, subd. (b)(1)), that he personally and intentionally discharged a firearm with respect to count one (§ 12022.53, subd. (c)), and that he personally used a firearm with respect to counts four and five (§ 12022.5, subd. (a)).

Sentencing was combined with the sentencing for defendant's convictions that arose out of a similar but unrelated incident that occurred about two weeks after the crimes in this case.[2] For the convictions in this case, defendant was sentenced to an indeterminate term of 15 years to life on count two, with consecutive determinate terms on counts four, five, and seven,

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[2] Defendant's other convictions occurred in *People v. Gonzales*, San Joaquin County Superior Court No. MF027267A, a companion case on appeal. (*People v. Gonzales* (Feb. 4, 2005, C046229) [nonpub. opn.].)

with enhancement of counts four and five for acting in concert with a criminal street gang. Sentences on counts one and six were stayed pursuant to section 654.

Together with sentencing on his convictions in the other case, defendant received a state prison term of 15 years to life plus a determinate term of 53 years 8 months.

DISCUSSION

I

Defendant contends the trial court erred in failing to instruct sua sponte on attempted voluntary manslaughter through heat of passion as a lesser included offense of attempted murder as charged in count one. He argues the events of May 14, 2003, should be viewed as two distinct incidents as follows: The first incident was instigated by defendant and his cohorts when they approached Roblero and Perez at the house. It ended when defendant and his cohorts left. The second incident began when Roblero chased after defendant, who turned around and drove back toward Roblero. As their vehicles passed, Roblero veered into defendant's car and thus provoked the shots that defendant fired. We are not persuaded.

The distinction between murder and voluntary manslaughter, and thus between attempted murder and attempted voluntary manslaughter, lies in the existence of malice. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) A person who unlawfully attempts to kill nonetheless lacks malice--and is guilty of attempted voluntary manslaughter--if his "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary

[person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 163; see also *People v. Lasko, supra*, 23 Cal.4th at p. 108.)

In this case, a claim of heat of passion lacks merit for a number of reasons.

First, a person who engages in criminal behavior cannot claim that his victim's response constitutes provocation. (*People v. Jackson* (1980) 28 Cal.3d 264, 306, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) Here, defendant instigated a potentially violent and deadly attack on Roblero, Perez, and the others who were present in a residence. Roblero's response may not have been the most intelligent decision he could have made, but it unquestionably was a response to defendant's criminal behavior.

Second, as the California Supreme Court said long ago, "in case of mutual combat, in order to reduce the offence from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was sought or taken by either side . . . ." (*People v. Sanchez* (1864) 24 Cal. 17, 27.) In this case, defendant instigated the altercation with Roblero and, in doing so, defendant took steps to ensure that throughout he would have the undue advantage conferred by a gun.

Third, a trial court does not have an obligation to instruct sua sponte on heat of passion unless both adequate provocation and heat of passion are affirmatively demonstrated. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719, disapproved on other grounds in

People v. Breverman, supra, 19 Cal.4th at p. 178, fn. 26 and *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, see also *People v. Jackson, supra*, 28 Cal.3d at p. 305.) "It is not enough that provocation alone be demonstrated. There must also be evidence from which it can be inferred that the defendant's reason was in fact obscured by passion at the time of the act." (*People v. Sedeno, supra*, 10 Cal.3d at p. 719.) Here, while there was evidence to support the view that Roblero caused the automobile collision by turning into defendant's car, there was no evidence presented to establish that defendant in fact acted in a heat of passion. His conduct in shooting at Roblero was entirely consistent with his original intent, to kill or seriously injure Roblero.

Accordingly, there was no basis for an instruction on heat of passion in this case.

In any event, as we will explain, defendant cannot complain because in discussing the proposed instructions, defense counsel told the trial court that he was making a tactical decision not to request any instructions on attempted voluntary manslaughter. (*People v. Duncan* (1991) 53 Cal.3d 955, 969; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.)

Defendant notes that a trial court has the duty to instruct on lesser included offenses which are supported by evidence, even when the defense objects. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) It is true that "[t]he obligation to instruct on lesser included offenses exists even when a defendant, as a matter of trial tactics, objects to their being given. But the doctrine of invited

error will operate to preclude a defendant from gaining reversal on appeal because of such an error made by the trial court at the defendant's behest." (*People v. Duncan, supra,* 53 Cal.3d at p. 969.)

Here, defendant pursued a theory of self-defense. In this case, the advantage of self-defense over a heat of passion theory is that self-defense would apply to both count one, attempted murder, and count two, shooting at an occupied vehicle. A heat of passion theory would apply only to count one. A conviction on count two with a gang enhancement finding, for which there was compelling evidence, would result in a prison sentence of 15 years to life. (§ 186.22, subd. (b)(4)(B).) In that event, the sentence for a conviction on count one, regardless of whether it was for attempted murder or attempted voluntary manslaughter, would be stayed pursuant to section 654. Accordingly, defendant would derive no practical benefit from a heat of passion theory if the jury found him guilty on count two with the enhancement allegation. Therefore, defense counsel's choice was to focus upon a theory of self-defense that would apply to both count one and count two.

Our Supreme Court has recognized that heat of passion can be inconsistent with self-defense. (*People v. Wickersham* (1982) 32 Cal.3d 307, 327-328, overruled on another ground in *People v. Barton, supra*, 12 Cal.4th at p. 200.) Defense counsel recognized this too and reasonably chose to forgo a heat of passion theory in favor of self-defense. Thus, even if there had been sufficient evidentiary support for a heat of passion instruction, the court's failure to give it would be invited error which would not compel

reversal of the judgment. (*People v. Duncan, supra,* 53 Cal.3d at p. 969.)

II

Defendant claims the trial court erred in failing to instruct sua sponte on the requirement of jury unanimity with respect to counts four and five, the assaults on Roblero and Perez. In his view, this instruction was required because there was evidence of two assaults against each victim, first at the house and second when he shot into Roblero's car. The contention lacks merit.

"When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) Thus, we apply what may be called an "either/or" rule. (*Ibid.*)

Initially, we reject defendant's argument that Perez must have been in Roblero's car at the time of the shooting. A neighbor who witnessed the event testified Roblero was alone in his car at that time. And Roblero testified he was alone when the shooting occurred. In fact, Roblero stated that he was angry with Perez, calling him a traitor and a so-called friend because he refused to go with Roblero in chase of defendant and his cohorts. After the collision and the shooting, Perez came out to the street and attempted to throw a sledgehammer head at defendant's car. Defendant's assertion that Perez must have been in Roblero's car at the time of the shooting

because he threw the sledgehammer head does not follow from, and is inconsistent with, the testimony.

In any event, the either/or unanimity rule was satisfied here. First, the prosecutor specifically told the jury that counts four and five "apply to the conduct that took place outside of [Roblero's friend's] door. Okay, that took place right there outside of the door." Then, with respect to counts four and five, defense counsel focused entirely on the events in the yard in arguing defendant's conduct did not amount to an assault or, at most, constituted a lesser offense than that charged.[3] And in closing, the prosecutor again focused the jury's attention on the events in the yard with respect to counts four and five. Consequently, the prosecutor made a sufficient election of the acts relied upon for counts four and five, and a unanimity instruction was unnecessary. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1454-1455.)

III

Lastly, defendant contends the evidence does not support his conviction on count seven, possession of a firearm by a convicted felon. We disagree.

In fact, that charge was not contested in the trial court. There was undisputed testimony that defendant had a prior felony conviction for violating Vehicle Code section 10851. The People

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[3] With respect to counts four and five, defense counsel asked for, and the trial court gave, instructions on possession of a firearm with intent to assault and simple assault as lesser included offenses.

submitted documentary evidence reflecting the prior conviction. In view of the overwhelming evidence that defendant possessed a gun on May 14, 2003, defense counsel chose to concede the issue. Advising that he does not believe in telling the jury "a bunch of baloney," counsel said: "My client had a gun. And on the count that says we're -- which my client is accused of being an ex-felon in possession of a weapon, I -- I confess, I throw in the towel. He was. He did. And there's no argument about that."

On appeal, defendant now claims the documentary evidence shows a conviction for a misdemeanor rather than a felony. Not so.[4]

Defendant's prior conviction was for theft or unauthorized use of a vehicle in violation of Vehicle Code section 10851, subdivision (a). This section provides for punishment by imprisonment in the county jail for not more than one year, or by imprisonment in the state prison, or by fine, or by both imprisonment and fine. Since

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[4] The People ask us to take judicial notice of the reporter's transcripts of the proceedings that resulted in defendant's prior conviction. According to the People, such a procedure was authorized in *People v. Wiley* (1995) 9 Cal.4th 580, at page 594 (hereafter *Wiley*). We disagree. *Wiley* involved an issue with respect to an enhancement allegation upon which the appellant had no right to a jury determination. (*Ibid.*) Although the evidence before the trial court supported its finding, that was a matter which could be revisited on habeas corpus with evidence outside the trial record. (*Ibid.*) Under those circumstances, the Supreme Court concluded that it was appropriate to take judicial notice of additional materials in order to resolve the question. (*Ibid.*) Here, in contrast, we are considering a conviction by a jury for a substantive offense. Obviously, in determining whether the evidence supports the jury verdict, we must confine our consideration to evidence that was before the jury. (*People v. Pearson* (1969) 70 Cal.2d 218, 221-222, fn. 1.) Accordingly, we deny the request for judicial notice.

the offense can be punished by a jail term or a prison term, it is a so-called "wobbler," i.e., a crime that can be a felony or a misdemeanor in the discretion of the court. (§ 17, subd. (b); *People v. Municipal Court (Kong)* (1981) 122 Cal.App.3d 176, 179, fn. 3.)

Section 17, subdivision (b) sets forth the circumstances in which an offense that is a wobbler becomes a misdemeanor: (1) upon a judgment imposing punishment other than imprisonment in state prison; (2) when, upon committing the defendant to the Youth Authority, the court declares the offense to be a misdemeanor; (3) when the court suspends the imposition of sentence and grants probation and at that time, or upon subsequent application, declares the offense to be a misdemeanor; (4) when the prosecutor files a complaint specifying the crime to be a misdemeanor in a court having jurisdiction over misdemeanors; and (5) when, at or before a preliminary hearing or before filing a holding order pursuant to section 872, the magistrate declares the offense to be a misdemeanor.

Until one of these measures is taken to designate a crime as a misdemeanor, the crime is treated as a felony for all purposes. (*People v. Williams* (1945) 27 Cal.2d 220, 229.) This includes the prohibition against the possession of a firearm by a convicted felon. (*People v. Banks* (1959) 53 Cal.2d 370, 387-388.)

The People's exhibit 30 reflects that in 2001, defendant was charged in Santa Clara County Superior Court with two counts of theft or unauthorized use of a vehicle. (Veh. Code, § 10851, subd. (a).) It was alleged that he took, damaged, or destroyed property of a value exceeding $50,000. (§ 12022.6, subd. (a)(1)

[this section specifies a one-year enhancement for any felony in which property of a value greater than $50,000 is taken, damaged, or destroyed].) He also was charged with misdemeanor driving with a suspended or revoked license. (Veh. Code, § 14601.1, subd. (a).)

Defendant entered into a plea agreement. The minute order shows he agreed to plead nolo contendere to count two, the theft or unlawful use of a vehicle, as a felony, nolo contendere to the enhancement allegation on count two, and nolo contendere to the misdemeanor charge. Count one would be dismissed, and defendant would be granted formal probation for three years with a six-month jail term. Defendant was advised of various matters, including that his conviction would preclude him from possessing firearms. The minute order form has places where it may be indicated that a condition of the plea would be reduction of the crime to a misdemeanor immediately or reduction of the crime to a misdemeanor after one year of probation. Reduction to a misdemeanor was not made a part of defendant's plea agreement.

Defendant was sentenced in accordance with the agreement. The court suspended imposition of sentence and granted formal probation for three years. And the court ordered defendant to serve six months in the county jail as a condition of probation. The court did not declare the offense to be a misdemeanor.

Nevertheless, defendant points to the six-month jail term ordered by the court and asserts that was a punishment other than imprisonment in the state prison, thus making the offense a misdemeanor. The contention fails.

A court cannot impose and order execution of sentence and grant probation. The concepts are mutually exclusive. (See *People v. Municipal Court (Lozano)* (1956) 145 Cal.App.2d 767, 771; *People v. Berkowitz* (1977) 68 Cal.App.3d Supp. 9, 13, disapproved on another ground in *People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 435.) Therefore, in granting probation, a court must either impose sentence but suspend execution, or suspend the imposition of sentence. (§ 1203.1, subd. (a).)

In defendant's prior proceeding, the court suspended the imposition of sentence and granted probation. When the court suspends the imposition of sentence and grants probation, the order granting probation is deemed to be a final judgment for purposes of taking an appeal but is not a judgment imposing punishment within the meaning of section 17, subdivision (b)(1). (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796; *People v. Banks, supra,* 53 Cal.2d at pp. 375-376, 384-385.) In such a circumstance, the offense is a felony unless the sentencing court expressly declares it to be a misdemeanor. (§ 17, subd. (b)(3).)

In granting felony probation, a court may order the defendant to serve a period of time in county jail. (§ 1203.1, subd. (a).) Such an order is a condition of probation rather than a judgment imposing punishment. (*People v. Rojas* (1962) 57 Cal.2d 676, 680.) Where, as here, a court suspends the imposition of sentence, grants probation with an order for a term in county jail, and does not declare the offense to be

a misdemeanor pursuant to section 17, subdivision (b)(3), then the offense is a felony for purposes of the prohibition against possession of firearms by convicted felons contained in section 12021. (See *People v. Banks, supra*, 53 Cal.2d at pp. 375-376.)

DISPOSITION

The judgment is affirmed.[5]

SCOTLAND, P.J.

We concur:

BLEASE, J.

DAVIS, J.

[5] In the companion appeal (*People v. Gonzales* (Feb. 4, 2005, C046229) [nonpub. opn.]), we conclude the judgment must be modified pursuant to section 654 with respect to two of the offenses at issue in that case. The effect of the modification is a reduction of defendant's determinate prison term by one year four months. We will order such modification in our disposition in that case.